No. 92-137

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In The

Supreme Court of the United States

October Term, 1992

THE RIDGECREST POLICE, a Municipal Law Enforcement Agency; THE CITY OF RIDGECREST, a Municipal Corporation; EDWARD JOHN LUARCA aka E.J. LUARCA; STEPHEN COMPTON; RANDY GENE BIAS; JEFFREY KRUGER,

Petitioners,

vs.

KENNETH CHRISTOPHER CURNOW, a minor, by and through his Guardian ad Litem, SANDRA CURNOW; KEN CURNOW; SHEILA EFFLANDT; SANDRA CURNOW as Administratrix of the Estate of STEVEN MURRAY CURNOW, Deceased; CHRIS CURNOW and SANDRA CURNOW, as an individual,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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I

QUESTIONS PRESENTED FOR REVIEW

1. Did the Court of Appeals correctly consider the statement of Mercedes Taylor in determining the Motion for Summary Judgment?

2. Did the Court of Appeals err in denying Petitioners Motion for Summary Judgment?

3. Did the District Court err in denying Petitioners Compton, Kruger and Bias' claim of qualified immunity?

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II

STATEMENT OF THE CASE

A. PROCEEDINGS BELOW

This action stems from the shooting death of Steven Curnow, a resident of Ridgecrest, California. Plaintiffs allege that decedent's death constituted a violation of their civil rights under 42 U.S.C. §§ 1981, 1983 and 1985 by defendants.

On October 7, 1988 plaintiffs filed the Third Amended Complaint. [App. C00198]

On December 19, 1988 hearing was held on defendants' Motion to Dismiss pursuant to Rule 12(b)(6), Motion to Strike pursuant to Rule 12(f) and Sanctions pursuant to Rule 11. On March 3, 1989 the Court issued it's ruling on the motion. [App. C00187]

On January 10, 1990 Petitioners filed their motion for Summary Judgment. [App. C00127-00160]

On February 12, 1990 in the United States District Court for the Eastern District of California, hearing was held on Petitioners motion for Summary Judgment on the grounds of Qualified Immunity.

On February 15, 1990 the Court issued its findings and Order denying defendant's motion for Summary Judgment, from which the defendants appealed to the United States Court of Appeals for the Ninth Circuit. [App. C00101]

On December 26, 1991 the Court of Appeals issued and filed its opinion, affirming the ruling of the District Court in denying the motion for Summary Judgment.

[App. C00004] From that opinion the Petitioners have filed this Petition for Writ of Certiorari.

B. STATEMENT OF FACTS

On April 5, 1986, while investigating a shooting report at the residence of decedent, police allegedly went to the wrong house, ordered those residents out of the house and, after discovering their mistake, went to the decedent's residence. Defendant Bias, a police officer, spoke with Mercedes Taylor and decedent, who allegedly showed his rifle to Bias who told decedent that it was legal to have. The police concluded that matter was a vandalism incident.

Respondents allege that the police were informed that Taylor had been threatened by her ex-husband, that she believed him responsible for the incident and could return at any time, and that this was the reason for the rifle.

On April 6, 1986 the police returned to decedent's residence. Decedent and Taylor had gone to a bar earlier that evening, Taylor was allegedly intoxicated. Decedent took Taylor to his residence and placed her on his living room floor. While police were re-interviewing decedent's neighbors they walked across a common driveway and looked through decedent's window where they saw decedent bent over Taylor.

The police allege that decedent was slapping Taylor in the face and saying "Wake up!", that he was gesturing into the kitchen as if another person were present, and that Taylor appeared to be unconscious. The police then

called for back-up. After back-up officers arrived, the police again peered into the house and saw a weapon lying on the floor. They concluded that Taylor was the victim of a homicide.

The police devised a plan of entry to break down the door. It is at this point that the crucial facts are disputed. As the police entered, they contend decedent grabbed for the weapon. They contend they then shot him in the arm and back. Plaintiffs, however, contend that defendants simply broke the door down and began shooting. Plaintiffs argue that as decedent turned to flee, the police shot him again.

Plaintiffs claim that Curnow's death constituted a violation of plaintiffs' civil rights under 42 U.S.C. §§ 1983 & 1985.

III

ARGUMENT

A. Mercedes Taylor's Statement Was Correctly Considered

Mercedes Taylor's statement was properly considered by the district court in denying summary judgment. The District Court's order [App. C00102-C00104] found that Mercedes Taylor's statement was admissible. The district court's order at page 2, line 24 - page 3, line 11 [App. C000102] refers to and quotes the court reporter who signed a statement under penalty of perjury stating:

> "I, KRISTIN COIL, shorthand reporter do hereby state:

> "That prior to being examined, the witness named in the foregoing sworn statement, to wit, MERCEDES TAYLOR, was duly sworn to testify the truth, the whole truth, and nothing but the truth;
>
> "That said sworn statement was taken down by me in shorthand at the time and place therein named and thereafter reduced to typewriting.
>
> "I further state that I am not interested in the event of the action." [App. C00103]

At [App. C00104] the District Court stated, "The court's conclusion that it will allow use of Taylor's statement presents the court with disputed material facts." As the Court of Appeal held in *Geear v. Boulder Community Hospital,* 844 F.2d 764 (1988) that Rule 56 requirements are satisfied by the District Court examining written briefs with supporting materials.

Petitioners' petition concedes, at page 4, the authority of a court reporter to administer oaths.

The Ninth Circuit agreed with the district court and found that, under Rule 56(c), Taylor's testimony was the substantial equivalent of a sworn affidavit. [App. C00004] Thereafter, the court held that the district court "properly considered Taylor's statement pursuant to Rule 56(c) because her answers to the questions were given under oath." The court found Taylor's statement to be "at least as reliable as an affidavit," notwithstanding the fact that the statement was unsigned.

The Ninth Circuit cited two of its previous cases, *Hoover v. Switlik Parachute Co.,* 663 F.2d 9645 (9th Cir. 1981), and *In re Sunset Bay Associates,* 944 F.2d 1503 (9th

Cir. 1991), in support of its ruling. In *Hoover*, the Ninth Circuit admitted depositions for the purpose of summary judgment that were taken with an opportunity for the opposing party to cross-examine the deponents. The *Hoover* court held that, while the documents could not be admitted as Rule 56(c) depositions, they met the requirements for Rule 56(c) affidavits since they were made on personal knowledge and set forth facts in evidence. (*Hoover, supra*, 663 F.2d at 966.)

Thereafter, the court in *In re Sunset Bay* took the logic behind *Hoover* one step further. The court concluded that a witness statement taken in question and answer form, which was not subject to cross-examination nor signed, was admissible under Rule 56(c). The court explained its decision as an application of the "pragmatic" approach to consideration of unverified materials; namely, whether the document "is at last as reliable as an admissible affidavit." (*In re Sunset Bay, supra*, 944 F.2d at 1509-1510.) The court found that the document was reliable because the deponent was *sworn*, even though the document was unsigned.

Contrary to Petitioners' arguments, the decision of the Ninth Circuit to admit the unsigned statement of a witness for purposes of summary judgment is not in conflict with the decisions of the courts in the other circuits to consider the issue. In none of those cases had the witness' statement been sworn and taken by a court reporter who also swore to the fact of the witness' sworn testimony.

Petitioners argue that Rule 56(c) mandates the entry of summary judgment due to respondents failure to

establish that a genuine issue of material fact exists. In support of their argument petitioners cite this Court's opinion in the case of *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

While the rule and case are cited for the correct proposition, this case does not support Petitioner's argument against the denial of the motion for summary judgment. In *Celotex, supra,* this court, in a 5-4 ruling, overturned the reversal of a grant of summary judgment. In citing its previous holding in *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970), this court affirmed that:

> " . . . the party opposing the motion for summary judgment bears the burden of responding only after the moving party has met its burden of coming forward with proof of the absence of any genuine issues of material fact."

The court overturned because the district court made an express finding of no material fact. Here, on the contrary, the district court found that the evidence submitted did not preclude a finding of respondents' presenting a genuine material fact.

B. The Court of Appeals Was Correct in Affirming the District Court's Denial of the Motion for Summary Judgment

This case has clearly disputed facts, supported by opposing declarations and evidence submitted by the parties. The scope of inquiry in such appeals is extremely narrow, although these appeals appear to be a fairly routine part of § 1983 cases which survive motions for summary judgment.

As Circuit Judge Schroeder stated in *Schwartzman v. Valenzuela*, 846 F.2d 1209, 1210 (9th Cir. 1988),

> " . . . defendants apparently now deem it mandatory to bring these appeals from any adverse ruling, no matter how clearly correct the trial court's decision."

The Court held in *Geear v. Boulder Community Hospital*, 844 F.2d 764 (1988) that Rule 56 requirements are satisfied by the District Court examining written briefs with supporting materials. Inferences to be drawn from underlying facts contained in evidential sources submitted to the court must be viewed in the light most favorable to the party opposing the motion. *Chipollini v. Spencer Gifts, Inc.*, 814 F.2d 893 (1987).

This is a case involving the denial of the motion for summary judgment because the District Court did not believe the defendants were entitled to qualified immunity. It is a case, and resulting order and affirming decision, dealing with disputed facts. The district court order spelled out the different facts stated by the affidavits and declarations.

The solitary basis for petitioners' position is the statement of Mercedes Taylor was not admissible. The court's order stated at page 4 "The court's conclusion that it will allow use of Taylor's statement presents the court with disputed material facts." The trial court relied on *White by White v. Pierce County*, 797 F.2d 812, 815-816 (9th Cir. 1986), in which the Ninth Circuit held:

> "Probable cause is ordinarily a question for the jury, and denial of summary judgment is appropriate only if no reasonable jury could find that

> the officers had probable cause. *McKenzie v. Lamb*, 738 F.2d 1005, 1008 (9th Cir. 1984). We have applied this rule when determining whether officers engaging in a search had qualified immunity . . . If the question of probable cause is allowed to go to the jury where qualified immunity is at issue, this defense will be effectively lost . . . Here, the existence of probable cause was to be effectively lost . . . Here, the existence of probable cause was to be determined by the trial court, . . . "
>
> *White by White, supra,* on Excessive Force:
>
> "The question of the reasonableness of the force used in an arrest is usually for the jury. See, e.g., *Robins*, 773 F.2d at 1010 [*Robins v. Harum*, 773 F.2d 1004 (9th Cir. 1985)]; McKenzie, 738 F.2d at 1011. However, as with probable cause, the trial court, and this court on appeal, must decide this issue on summary judgment where qualified immunity is at issue."

Where the underlying material facts are disputed, the district court decides the issue of whether plaintiff's clearly established constitutional rights were violated by assuming that plaintiff's version of the facts is correct. The Court of Appeals has repeatedly held that defendants have the burden of proof, *Benigni v. City of Hemet*, 853 F.2d 1519, 1525 (9th Cir. 1988), and the standards governing motions for summary judgment.

Benigni involved a discussion of the proper jury instructions on the issue of qualified immunity, another indication that there will be circumstances where qualified immunity cannot be resolved pretrial.

Di Martini v. Ferrin, 889 F.2d 922 (9th Cir. 1989); *Scott v. Henrich*, 700 F.Supp. 498 (D.C. Mont. 1988); *Wood v. Ostrander*, 879 F.2d 583, 591, 596 (9th Cir. 1989); *Manhattan Beach Police Officers v. Manhattan Beach*, 881 F.2d 816, 819 (9th Cir. 1989) are all Ninth Circuit cases consistent with the findings of *Benigni*.

In another § 1983 case the Court of Appeal ruled in *Goka v. Bobbitt*, 862 F.2d 646 (1988) that the moving party may not identify only those portions of the record which support their position on the theory that the burden of producing contrary was on the party opposing summary judgment.

C. The Court Correctly Denied Qualified Immunity To Petitioners Compton, Kruger and Bias

Petitioners fail to grasp the district court's findings regarding two shootings of the decedent. The first shooting, subsequent to the entry into the house, has been found by this court to be reasonable. As the court stated at page 6, line 22 through page 7, line 11, [App. C00106] the second shooting, as decedent fled is indeed in question.

> "However the second event involved, the actual shooting of decedent, is more troublesome. Here, the facts necessary for a proper determination of this issue are in dispute. If decedent did in fact reach for the weapon upon the police's entry into the house, their subsequent shooting would be justified.
>
> " . . . In addition, the propriety of defendants' shooting decedent as he fled, if true, is also questionable. Such actions would violate clearly

> established law and, hence, qualified immunity would no longer be available."

(at page 7, lines 5-8) [App. C00107]

The Court of Appeals' opinion, however, went further and found, at page 17128 that the defendants-appellants were not entitled to qualified immunity due to the conflicting evidence presented to the district court:

> "Thus, viewing the evidence in the light most favorable to the nonmoving party, the defendants-appellants are not entitled to qualified immunity." [A-11]

The more recent cases of *Garmon v. Lumpkin County*, 878 F.2d 1406 (1989) and *Melear v. Spears*, 862 F.2d 1177 (1989) both held that qualified immunity is not a defense to an action against someone in an official capacity where the actions of the defendant were not reasonable.

1. Qualified Immunity

Excessive Force

Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) is the benchmark case, holding that a law enforcement officer in a § 1983 action is entitled to qualified immunity from liability for damages if his conduct does not violate clearly established constitutional rights, of which a reasonable law enforcement officer would have known. The Supreme Court explained, in *Anderson v. Creighton*, 483 U.S. 635 (1987), the question of clearly established constitutional rights must be decided in the particular rather than the general sense and that the inquiry is totally objective, although the inquiry is fact specific.

In a similar case summary judgment was denied to an officer who shot a store owner under the mistaken belief that there was a hostage situation. The court held that the complex factual situation created genuine issues requiring jury determination. *Thompson v. Spikes*, 663 F.Supp. 627 (SD GA 1987).

The district court cited *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) in its order of March 3 [Page 4, E.R. 83] and clearly concluded that qualified immunity was not available to petitioners. " . . . If the officials knew, should have known, or intended that their actions would violate plaintiff's rights, the immunity will not be available. Qualified immunity is a "good faith" defense. Therefore, subjective aspects involved in this defense such as the officers' experiences, values and emotions must be considered."

In accord are *White By White v. Pierce County*, 797 F.2d 812 (9th Cir 1986); *United States v. Leon*, 468 U.S. 897 (1984); *Massachusetts v. Sheppard*, 468 U.S. 981 (1984).

The district court also considered various cases dealing with police shootings and applied them to the instant case. The court, at page 7, line 17 of the order denying summary judgment [App. C00107]:

> "Taking these facts into consideration with the sworn statement of Mercedes Taylor compels denial of this motion. Her statement, if eventually found to be true by a jury, that the decedent was not hitting her, that the police did not identify themselves before firing the first shot, that decedent was shot in the back by the first shot and inferentially did not reach for the weapon prior to the first shot, that the decedent's gun

with a clip that extrudes 5 inches was unloaded, and that the decedent grabbed the gun by the muzzle as he attempted to flee the residence persuaded the court that the deadly force used under these circumstances was constitutionally unreasonable."

IV

CONCLUSION

This case, unlike those cited by petitioners in their petition, is not without serious disagreement as to the basic facts. The other cases dealt with differing arguments over basic facts which were not disputed, only the *import* of the facts. The instant case is a Court of Appeals Opinion upholding an **interlocutory order based on a factual finding not on a dispute over the law** as interpreted by the court.

The Court of Appeals made its ruling based on **conflicting facts** and stated that because of a factual conflict it could not find that the Defendants/Appellants (Petitioners herein) were entitled to qualified immunity for purposes of the motion for summary judgment.

Based on all the foregoing, Respondents urge this court to uphold the Court Of Appeal's Ruling affirming the denial of Summary Judgment and deny the Petition for Writ of Certiorari.

Dated: October 16, 1992

Respectfully submitted,

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